(3)

Supreme Court, U.S.
FILED
JUN 6 - 2005
OFFICE OF THE CLERK

No. 04-1252

In the Supreme Court of the United States

AMERICAN PELAGIC FISHING COMPANY, L.P.,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF FOR PETITIONER

JEFFREY W. SARLES
Mayer, Brown, Rowe & Maw LLP
190 South LaSalle Street
Chicago, IL 60603
(312) 782-0600

EILEEN PENNER
Counsel of Record
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3242

Counsel for Petitioner

[Additional counsel appear on signature page]

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. The Opposition Confirms The Petition's Showing That The Ruling Below Conflicts With The Court's Precedents On An Important Federal Question 2

II. Based On The *Penn Central* Factors The Trial Court's Ruling Should Have Been Affirmed 8

CONCLUSION 10

TABLE OF AUTHORITIES

Page(s)

Cases

Armstrong v. *United States*, 364 U.S. 40 (1960) 4

Eastern Enters. v. *Apfel*, 524 U.S. 498 (1998) 10

Kimball Laundry Co. v. *United States*, 338 U.S. 1 (1949) 6, 9

Lingle v. *Chevron U.S.A. Inc.*, 2005 WL 1200710 (U.S. May 23, 2005) 10

Lucas v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992) 1, 2, 3, 4

Monongahela Nav. Co. v. *United States*, 148 U.S. 312 (1893) 7

Nixon v. *United States*, 978 F.2d 1269 (D.C. Cir. 1992) 5

Palazzolo v. *Rhode Island*, 533 U.S. 606 (2001) 1, 3

Penn Central Transp. Co. v. *City of New York*, 438 U.S. 104 (1978) 3, 4, 8

Pete v. *United States*, 531 F.2d 1018 (Ct. Cl. 1976) 6

Phillips v. *Washington Legal Found.*, 524 U.S. 156 (1998) 4

TABLE OF AUTHORITIES
(continued)

Page(s)

Pittman v. *Chicago Bd. of Educ.*, 64 F.3d 1098 (7th Cir. 1995) 5

Ruckelshaus v. *Monsanto Co.*, 467 U.S. 986 (1984) 4

United States v. *Cors*, 337 U.S. 325 (1949) 4

United States v. *Fuller*, 409 U.S. 488 (1973) 6, 7

United States v. *Rands*, 389 U.S. 121 (1967) 6

United States v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) 3

United States v. *Security Indus. Bank*, 459 U.S. 70 (1982) 4

Webb's Fabulous Pharms. v. *Beckwith, Inc.*, 449 U.S. 155 (1980) 4

Statutes and Regulations

16 U.S.C. § 1811 7

15 C.F.R. § 904.300(a) 9

50 C.F.R. § 648.4(h) 9

Other Authorities

Bell & Parchomovsky, *A Theory of Property*, 90 Cornell L. Rev. 531 (2005) 2

TABLE OF AUTHORITIES
(continued)

Page(s)

Brilmayer & Klein, *Land and Sea: Two Sovereignty Regimes in Search of a Common Denominator*, 33 N.Y.U. J. Int'l L. & Pol'y 703 (2001) 7

Giammarino & Nosal, *Loggers Versus Campers: Compensation for the Taking of Property Rights*, 21 J. L. Econ. & Org. 136 (2005) 2

H.R. Rep. No. 94-445 (1975) 5

http://oceancommission.gov/commission/groups/governance.html 7

Penalver, *Regulatory Takings*, 104 Colum. L. Rev. 2182 (2004) 10

REPLY BRIEF FOR PETITIONER

The Federal Circuit ruled that a property owner is not entitled to a takings analysis when government deprives property of economic value pursuant to a previously declared "sovereign right" to regulate. Although the government agrees, its brief in opposition confirms that the ruling conflicts with controlling precedent on a critical federal question.

The petition (at 11-16) detailed how the Federal Circuit's ruling that regulated property is not property conflicts directly with this Court's decisions in *Lucas* and *Palazzolo*. The government's only response is to observe that *Lucas* and *Palazzolo* involved real property rather than personal property like the vessel at issue here. Opp. 7. The proffered distinction is nonviable. As explained below, the Court long has applied the Takings Clause to non-real property. There is no principled basis for exempting non-real property from the principles set forth in *Lucas* and *Palazzolo*: many uses of real property also are "a matter of governmental permission." Opp. 12-13. The extreme nature of the government's view—that the Takings Clause applies only to "real property" (Opp. 11), making the government immune from takings liability for adopting laws that deprive personal property of "all economic value" (Opp. 8)—illustrates the urgent need for clarification of the nature of property rights subject to the Takings Clause.

As the government's opposition makes clear, the importance of the federal question—whether the government may eliminate property interests by legislatively declaring its "sovereign right" to regulate property uses prior to adopting confiscatory regulations—cannot be denied. Although the government disputes that the ruling would eviscerate ***real*** property rights, it ***agrees*** that this is the consequence for ***personal*** property rights. Opp. 8. Thus, even as interpreted by the government, the ruling below would work a stunning revision of regulatory takings jurisprudence.

Even if the scope of the ruling were limited to personal property situated ***identically*** to the *Atlantic Star*—*i.e.*, to personal property used in public spaces subject to the government's "sovereign rights" (though neither the Federal Circuit nor the government suggests any such limitation)—the consequences would be intolerable. At minimum, the ruling forbids any takings analysis when the government restricts or bans use of any fishing vessels, oceanliners, trucks, and airplanes, all of which operate in public spaces subject to the government's "sovereign rights" or sovereignty (the EEZ, internal waters, federal highways, and U.S. airspace). The ruling thus imperils the security of hundreds of billions of dollars of business investments—a point to which the government offers no response. See NAHB/NSWMA Amicus Br. Such insecurity can only discourage investment in such vital sectors of our economy as the transportation and fishing industries. Cf. Giammarino & Nosal, *Loggers Versus Campers: Compensation for the Taking of Property Rights*, 21 J. L. Econ. & Org. 136, 151 (2005); Bell & Parchomovsky, *A Theory of Property*, 90 Cornell L. Rev. 531, 607 (2005). The Court should not permit this radical revision of established law and the economic destabilization that it will cause.

I. The Opposition Confirms The Petition's Showing That The Ruling Below Conflicts With The Court's Precedents On An Important Federal Question.

1. Although the Federal Circuit acknowledged that APFC had a property interest in its vessel, it held that APFC did not have a property interest in the only viable use of its vessel. Citing this Court's decision in *Lucas*, the court reasoned that Congress's adoption of the Magnuson Act in 1976, subjecting previously unrestricted fishing to U.S. sovereign regulatory authority, was a "background principle" of law that eradicated any property interest that vessel owners might previously have had in using their vessels to fish. App. 28a. According to the Federal Circuit, the 1976 enactment enabled

the government thereafter to adopt unforeseeable, economically devastating fishing restrictions with immunity.

The government makes no effort to defend this gross misinterpretation of the Court's holding in *Lucas* regarding which existing laws act as "background principles" excluding a property use from an owner's title. No defense is possible; the ruling below cannot be reconciled with *Lucas*. As the petition showed (at 3-4, 11-12) and the government does not contest, *Lucas* held that an existing law is not such a "background principle" unless it "***always*" *proscribed the particular use at issue.*** 505 U.S. at 1029-1030 (emphasis added). As the Federal Circuit expressly acknowledged, neither the Magnuson Act nor its implementing regulations ***ever*** proscribed the use at issue here. "[U]se of the *Atlantic Star* to fish was lawful not only under traditional property and nuisance principles, * * * but also under the regulatory regime by which its permits were issued." App. 21a-22a.

Moreover, the Magnuson Act did not make the legislation that idled the *Atlantic Star* ***foreseeable***. See Pet. 13-14. And *Palazzolo* held that even if a preexisting regulatory scheme ***did*** make adoption of a use restriction foreseeable, that does not foreclose a takings analysis, as the Federal Circuit held here. Rather, preexisting regulation merely factors into the reasonableness of the owner's expectations under the *Penn Central* analysis. The ruling below thus is irreconcilable not only with *Lucas*, but also with *Palazzolo*.[1]

---

[1] Moreover, the Magnuson Act cannot have eliminated vessel owners' property rights because it merely provided the government with regulatory authority and thus was not challengeable as a taking. "A requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself 'take' the property"; rather, a takings claim would be ripe "[o]nly when a permit is denied." *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127 (1985). Now that the government has actually applied its regulatory authority to restrict fishing access and a property owner has a ripe takings claim, the government denies liability on the ground that its unchallengeable prior declaration of a right to regulate eliminated any compensable property interest. Such a

2. Rather than contend that the Federal Circuit's "background principles" ruling is consistent with *Lucas*, the government argues that *Lucas* is inapplicable to non-real property. Opp. 7-8. But that cannot be right because the Court specifically applied *Lucas*'s "background principles" analysis to non-real property in *Phillips* v. *Washington Legal Found.*, 524 U.S. 156, 168 (1998). See Pet. 11.

Ignoring *Phillips*, the government invokes the observation in *Lucas* that a personal property owner should be aware that regulation may "render his property economically worthless." Opp. 7, quoting *Lucas*, 505 U.S. at 1027-1028. But *Lucas* never suggested that personal property is ***categorically*** excluded from Takings Clause protection, as the government argues. The scope of a personal property owner's expectations necessarily varies from case to case and thus must be examined under the reasonable expectations prong of the *Penn Central* test. Indeed, the Court repeatedly has applied a takings analysis to such non-real property as ships, *United States* v. *Cors*, 337 U.S. 325 (1949); trade secrets, *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986 (1984); liens, *Armstrong* v. *United States*, 364 U.S. 40 (1960); and bank interest, *Phillips*, *supra*; *Webb's Fabulous Pharms.* v. *Beckwith, Inc.*, 449 U.S. 155 (1980). Non-real property, even if something less than a "fee simple," is not "something less than property." *United States* v. *Security Indus. Bank*, 459 U.S. 70, 76 (1982). Owners of real and personal property alike have a property interest in using their property in any manner not foreclosed by background principles of existing law, subject to non-confiscatory governmental use regulations. *Lucas*, 505 U.S. at 1029. Whether particular use regulations are confiscatory can be assessed only by the takings analysis the Federal Circuit foreclosed.

3. The government also denies that a property right can

Catch-22—where neither the declaration of authority to regulate nor the confiscatory regulation itself can give rise to a takings claim—is plainly not what the framers of the Takings Clause had in mind.

exist in "a geographic area over which the United States government exercises 'sovereign rights.'" Opp. 8. As the government recognizes, however, acceptance of this principle would preclude private property rights in all "privately-owned fee land within the territorial borders of the United States," as well as in all federal lands and the EEZ. Opp. 11 n.1. The government asserts an exception for real property but offers no principled basis for reducing the Takings Clause to a real property provision. It purports to rely on "historical understandings as to the prerogatives that typically accompany private ownership of real property" (*ibid.*) but disregards comparable "historical understandings" authorizing personal property to be used, subject to nonconfiscatory government regulation, in a manner not foreclosed by background principles of law. The right of vessel owners to fish in ocean waters, for example, was recognized at common law and indeed has been since ancient times. Pet. 12 n.5; H.R. Rep. No. 94-445, at 24 (1975) (recognizing longstanding right to "free and open access to all stock on the high seas"). Further, the government completely disregards the Court's numerous takings analyses of restrictions on non-real property (Pet. 17) and the lower courts' consistent rejection of arguments that personal property lacks Takings Clause protection. *E.g.*, *Pittman* v. *Chicago Bd. of Educ.*, 64 F.3d 1098, 1104 (7th Cir. 1995) (Posner, J.); *Nixon* v. *United States*, 978 F.2d 1269, 1284 (D.C. Cir. 1992) (Edwards, J.).

Why has the government adopted such an extreme position? It undoubtedly recognizes that if the Takings Clause applies to personal property, the ruling below cannot be sustained. Petitioner was entitled to a *Penn Central* analysis of the legislation that grounded its fishing vessel.

4. To avoid that conclusion, the government also tries to confuse the nature of the property interest asserted by petitioner. The government recognizes that petitioner claims a property interest not in its permits but in its vessel. Opp. 8-

9. But it contends that petitioner seeks the "same practical result" as if it were claiming a property interest in its permits. Opp. 9. That is not true. Petitioner seeks compensation not only for abrogation of the *Atlantic Star*'s permits but also for its banishment from fishing anywhere in the EEZ. See Pet. 7. Moreover, the government's argument applies to ***any*** property interest whose use requires a permit. Yet that has not prevented the Court from performing takings analyses on numerous claims involving denials and revocations of permits. See Pet. 17 (listing cases).

5. The government's reliance on *United States* v. *Rands*, 389 U.S. 121 (1967), and *United States* v. *Fuller*, 409 U.S. 488 (1973) (Opp. 9-10), is misplaced. Neither involved the question at issue here—the existence of a compensable property interest. Both were direct condemnation cases in which the issue was not takings liability but rather how to value the just compensation to which the plaintiff was unquestionably entitled. In *Rands*, the question was whether an owner whose land was condemned for use as a power plant was entitled to the value of the land used as a power site or instead to an enhanced value based on the ***potential*** use of the land as a port site. 389 U.S. at 121. The Court ruled that compensation was limited to the value of the land in its actual use as a power site. *Id.* at 127. Similarly, in *Fuller*, the Court held that a landowner was entitled to the value of his condemned fee land but not to an enhanced value for use in combination with adjacent land "owned outright by the Government" and leased by the landowner. 409 U.S. at 493. Here, unlike in *Rands*, petitioner claims a taking of an ***existing*** property interest in its vessel and seeks as compensation only the value of the actual lost use. And unlike in *Fuller*, petitioner seeks no enhanced value but only the actual use value lost due to the vessel legislation, just as the owner in *Kimball Laundry*, 338 U.S. at 14, was entitled to the actual use value lost due to the taking of his laundry.[2]

---

[2] The government incorrectly suggests that no cases have found a taking

Moreover, unlike the government land in *Fuller*, the EEZ is not "owned outright" (409 U.S. at 493) by the Government—the government does not own the EEZ at all but merely exercises sovereign rights to regulate it.[3]

6. The government agrees with the ruling below that owners who "choose" to acquire personal property that can "profitably be used" only "pursuant to a federal permit" forfeit any claim to a compensable property interest. Opp. 12. But the same could be said of any investment in planes, telecommunications switches, or coal-fired generators, all of which are subject to regulation and require a permit to operate. Indeed, in each of the many cases recognizing compensable property rights in regulated property (see Pet. 17, 19), the owner "chose" to invest in property that could "profitably be used" only if a permit was issued. That has never been a ground for foreclosing a takings analysis. As the Court of Federal Claims succinctly observed: "To say that the plaintiff's rights to fish were subject to a pervasive regulatory scheme—plainly they were—is not to say that

---

of private property used in a "maritime area subject to the federal government's exclusive control." Opp. 11. One such case is *Pete* v. *United States*, 531 F.2d 1018 (Ct. Cl. 1976), which awarded just compensation for a regulatory taking of a vessel used in federally regulated waters within a national park. Another is *Monongahela Nav. Co.* v. *United States*, 148 U.S. 312, 336 (1893), which found a taking of a right to obtain tolls from locks constructed on navigable waters despite the government's "supreme control" over commerce and navigation.

[3] The U.S. asserts only limited "sovereign rights" in the EEZ (16 U.S.C. § 1811), which are "rights for specific purposes and thus do not permit a state to exercise full powers over these areas, as 'sovereignty' might allow." Brilmayer & Klein, *Land and Sea: Two Sovereignty Regimes in Search of a Common Denominator*, 33 N.Y.U. J. Int'l L. & Pol'y 703, 703 n.2 (2001). As the Governance Working Group of the U.S. Commission on Ocean Policy has explained, the U.S. has not asserted "broad control" over the EEZ "in the same way that we have asserted responsibility for onshore public lands." http://oceancommission.gov/commission/groups/governance.html; see also NELF Amicus Br. 6-14. Hence, the government's claim that the EEZ is "analogous" to federal land with respect to personal property use therein (Opp. 15) is misplaced.

nothing the government did with respect to those rights could ever implicate the Takings Clause." App. 59a.

The government's view that APFC had no compensable property interest because the *Atlantic Star* was designed specifically for mackerel fishing (Opp. 13 n.3) is equally misplaced. APFC designed its vessel for mackerel fishing in response to the government's ***requests*** that American fishermen utilize large vessels for mackerel fishing. Pet. 5-6. And in an economy that rewards specialization, property commonly is designed for specialized uses. Is coal mining equipment not "property" simply because its only viable use is coal mining? Again, the vast swath of compensable property rights abolished by the ruling below is startling.

7. In sum, there is an urgent need to clarify the scope of property interests subject to takings claims. Whether recently enacted legislation establishing regulatory authority, like the Magnuson Act, can constitute a "background principle" eradicating compensable property rights in regulated uses; and whether the Takings Clause applies to personal property, to property whose use requires a governmental permit, or to property used on lands or waters over which the government asserts sovereignty or sovereign rights—these are important threshold questions that, as the ruling below and the government's brief in opposition make abundantly clear, urgently require answers and guidance from this Court.

II. Based On The *Penn Central* Factors The Trial Court's Ruling Should Have Been Affirmed.

The government argues that, assuming a compensable property interest, there was no taking. But as the trial court found, each prong of the *Penn Central* test supports a taking.

Economic Impact. The trial court found—both on summary judgment on liability and after an extensive trial on damages—that the appropriations legislation deprived the *Atlantic Star* of all economically viable use. Pet. 9, 25. The government disagrees, contending that petitioner could have

tried to reflag its vessel to fish in foreign waters, "reoutfitted the vessel" for other purposes, or used it for "research." Opp. 11. But the trial court found each of these contentions refuted by the evidence, which showed that none of these options was economically viable. App. 51a-53a, 89a-90a.

The government also repeatedly claims that APFC ultimately sold the vessel "for a profit." Opp. 5, 16, 20. That is simply wrong. Because it had been barred from U.S. fisheries for over a year-and-a-half, the *Atlantic Star* was accumulating not fish but debts, and creditors were threatening to arrest the vessel. CA App. 617, 4083-4084. To save their investment, APFC's Dutch partners (who had fishing rights in E.U. waters not available to APFC) obtained the vessel in a forced sale and assumed APFC's debts. See App. 88a; CA App. 814, 3503, 3605, 3611. As the trial court found, "[t]here was no real economic gain to plaintiff." App. 108a. Furthermore, a subsequent sale is irrelevant to whether there was a temporary taking. Whether the owner in *Kimball Laundry* sold his laundry after recovering it was not a factor in the Court's ruling that he was entitled to the full rental value he lost due to the temporary taking. See 338 U.S. at 7.

Reasonable Expectations. The government contends that petitioner's expectation of operating the *Atlantic Star* was unreasonable because "petitioner's permits were revocable at any time." Opp. 15. In fact, the regulations ***barred*** revocation except for cause, indisputably absent here. See 50 C.F.R. § 648.4(h); 15 C.F.R. § 904.300(a). In any event, the National Marine Fisheries Service did not revoke the permits. It took special legislation to bar the *Atlantic Star* from fishing in U.S. waters. As the trial court found, no one could have foreseen such legislation. App. 63a-66a; Pet. 25. The government's longstanding policy of compensating vessel owners when restricting fishing rights (Pet. 6) further supports the reasonableness of APFC's expectations (and evinces the government's recognition that property rights were at stake).

The government says that petitioner must have foreseen the legislative ban because it insured against cancellation of its permits (Opp. 13 n.2, 15), a contention considered and rejected by the trial court (App. 108a). APFC obtained insurance only at the insistence of a prospective lender. In any event, the "possibility of indemnification" has never precluded a takings claim. See *Eastern Enters.* v. *Apfel*, 524 U.S. 498, 531 (1998).

Nature of the Governmental Action. The government argues that the *Atlantic Star* was not "singled out for unfavorable treatment" but just happened to be the only vessel that exceeded the new size limits. Opp. 18 n.3. That is false. Other vessels exceeded the size limits but they, unlike the *Atlantic Star*, were grandfathered. Pet. 7. Moreover, "regulations that are intended to single out an individual for adverse treatment may be hidden behind language of general applicability," which "was the situation in *American Pelagic*." Penalver, *Regulatory Takings*, 104 Colum. L. Rev. 2182, 2225 (2004). Indeed, competitors developed the new limits specifically to exclude the *Atlantic Star* but not their own vessels. Pet. 6.[4]

Finally, statements by the legislation's sponsors that it was directed at possible future harm (Opp. 13 n.4) do not bear on whether it effected a taking. Whether its "public use" was prevention of future harm or economic protectionism, the legislation required a single property owner to bear burdens more properly borne by the public as a whole—precisely the type of governmental action for which the Constitution requires just compensation.

CONCLUSION

The petition for a writ of certiorari should be granted.

---

[4] The government's reliance on lack of a "physical invasion" (Opp. 15) also is misplaced. It is well settled that regulation may be "so onerous that its effect is tantamount to a direct appropriation." *Lingle* v. *Chevron U.S.A. Inc.*, 2005 WL 1200710, at *7 (U.S. May 23, 2005).

Respectfully submitted.

JEFFREY W. SARLES
Mayer, Brown, Rowe & Maw LLP
190 South LaSalle Street
Chicago, IL 60603
(312) 782-0600

STEPHEN A. SALTZBURG
George Washington University National Law Center
2000 H Street, N.W.
Washington, DC 20052
(202) 994-7089

EILEEN PENNER
Counsel of Record
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3242

LAURIE FROST WILSON
8950 Hooes Road
Lorton, VA 22079
(703) 690-6262

JUNE 2005